In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 13 Case
GRAMS B. OSBORNE	)	
	)	Number 00-40453
Debtor	)	

ORDER ON DEBTOR'S THIRD EMERGENCY MOTION FILED JANUARY 23, 2001

On January 23, 2001, Debtor filed an Emergency Motion for Order Reimposing Stay and to Set Aside Order Denying Confirmation. A hearing had previously been scheduled in Debtor's case to consider a similar motion filed on December 1. In light of the overlapping nature of the relief sought, because parties in interest were on notice of the earlier filed hearing, and without objection by any party who appeared, the Court took up consideration of the Emergency Motion.

Debtor's case was filed February 17, 2000. A Motion for Relief from Stay was filed by M. L. Thomas and Edwina Thomas and scheduled for a hearing on March 16, 2000. At the hearing the Movants contended that a lease they had entered into with the Debtor had been terminated under applicable state law prior to the time that the Debtor's case was filed. Movants had filed a State Court dispossessory action to have Debtor removed from the property for non-payment of rent, but the dispossessory action was halted by the automatic stay of 11 U.S.C. § 362. Debtor's counsel asserted that there was a dispute

over the amount of back rent, but indicated that the Debtor wished to have the merits of this case heard in state court. I concurred that it was an issue properly subject to litigation in state court and entered an order on March 21, 2000, which modified the automatic stay to "permit the state court action to continue as if bankruptcy had not intervened." The order allowed the dispossessory action and the Debtor's counterclaim filed in response to it to proceed to final judgment and specifically authorized the state court to make a determination whether the Thomases terminated the Debtor's lease pre-petition. However, the order reserved to the Bankruptcy Court the collection of any *in personam* money judgment in the event such was rendered against the Debtor. *See* Doc. 19.

On March 28, Debtor *pro se* filed an Emergency Motion for an Order Reimposing Stay, Pending Court Modification of Order of 3/21/2000. *See* Doc. 24. Debtor's counsel filed a Motion for Reconsideration. *See* Doc. 28. The Court entered orders on April 20 denying Debtor's *pro se* Motion to Reimpose the Stay and his counsel's Motion for Reconsideration. *See* Docs. 39, 38. No appeal was taken from these orders. Thus, my Order permitting final adjudication of the landlord-tenant issue in State Court became final in this case.

On the July 18, 2000 Chapter 13 Confirmation calendar, a Modification before Confirmation and Objection to Confirmation and Motion to Dismiss were heard. At this hearing, which occurred after the conclusion of a bench trial conducted by Judge Fowler in the State Court, but before his final ruling was issued, the Debtor was alerted to the fact that the State Court judge had contacted an attorney representing the Thomases, and

requested that she prepare an Order in that matter. *See* Excerpt from July 18th 2000 hearing, Document 76. On September 12, 2000, the Honorable H. Gregory Fowler entered a final Order and Judgment finding in favor of Mr. and Mrs. Thomas and against the Debtor and Emani Hair Corporation in the amount of $20,940.00 plus interest.[1] Judge Fowler also held that "the lease was terminated by the Plaintiffs on May 17, 1999," which constituted a determination that the lease was terminated pre-petition.

Once again, Debtor filed a *pro se* Emergency Motion for an Order Reimposing the Stay, in this Court, in response to Judge Fowler's Order in State Court. On October 3, 2000, I entered an order denying the Debtor's Emergency Motion holding:

> Judge Fowler's Order unambiguously declares that the Debtor's lease with the Thomases was terminated pre-petition and that Debtor and those parties claiming under him have no remaining right to lease or possess the Thomases' property. The making of that determination was expressly authorized by this Court's previous Order lifting the stay to permit the State Court action to proceed. Any alleged error in that ruling is for the State Court or Georgia appellate courts.

See Doc. 71. No appeal was taken from this Order.

On October 19, 2000, a number of hearings were conducted in this case including a continued hearing on confirmation of the Debtor's Chapter 13 plan and on

[1] On May 18, 2000, before commencement of the bench trial, Judge Fowler granted the Thomases a Writ of Possession based on the Debtor's failure to comply with his prior order requiring the Debtor to pay post-petition rent into the registry of the State Court.

November 3, 2000, I entered an Order Denying Confirmation and Dismissing Debtor's Case. *See* Doc. 73. No timely appeal was taken from that Order within ten (10) days of November 3, 2000, as required by Bankruptcy Rule 8002.

On December 1, 2000, the Debtor filed a Motion to Set Aside the Order Denying Confirmation and Dismissing Debtor's Case, which will be denied by separate order. On January 23, 2001, he filed this Motion. This pleading, like many of the Debtor's previous pleadings, while articulately presented, is repetitive of previously advanced contentions which the Court has rejected and in many respects raises issues which are more appropriate for appellate review. Debtor, however, has filed no timely appeal of any Order of this Court.[2] Debtor treads perilously close to abusing the judicial process in his multiple, repetitive, untimely, and ill-founded post-judgment motions enumerated in this Order.

This motion, however, differs slightly because the principal basis on which the Debtor now seeks relief from the Court's order denying confirmation and dismissing the case is that Debtor alleges a violation of the Code of Judicial Conduct. It therefore may be construed as a motion under Rule 9024 and deemed timely. Accordingly, I will rule on the merits.[3]

---

[2] Debtor did, however, file with this Court a Notice of Appeal: Of Transcripts And Proceedings of July 18th, 2000 and August 29, 2000 on November 13, 2000. Debtor stated that he filed notices of appeal to the Court of Appeal (sic) of the State of Georgia on Chatham County State Court Civil Action #199-2746 F and requested that "the Clerk of this [Bankruptcy] Court will omit nothing from the records of proceedings conducted on July 18, 2000 and on August 29, 2000..." It is clear from this filing that Debtor's intention was to appeal the state court action to the proper authority, the Georgia Court of Appeals, and wished to notify this Court of that appeal.

[3] This Order encompasses all three of the Debtor's claims for relief: (1) First Basis for Reimposing Stay, And Seting (sic) Aside Order Denying Confirmation: "That the State Court Judge and Counsel for the Thomases Violated the Code of Judicial Conduct in the Handling of Debtor's State Case"; (2)Second Basis for

The Debtor alleges that there was *ex parte* communication between Judge Fowler and counsel for the Thomases. Specifically, Debtor contends that counsel for the Thomases stated in open court in a previous hearing in this Court that Judge Fowler, and/or an official in his office, "asked counsel for the Thomases to prepare a final order for him to sign" and that Debtor neither knew, nor was informed, that opposing counsel had been so contacted by the Judge or the Judge's staff. The remedy he seeks is that this Court set aside its Order Denying Confirmation and Dismissing his case on the grounds of this alleged misconduct in another forum.

Interestingly enough, the Debtor first complained of this alleged violation by virtue of his pleading filed January 23, 2001, which refers to a hearing held on July 18, 2000, in this Court some two months prior to the entry of Judge Fowler's order. The transcript of that hearing does reveal that colloquy occurred in this Court which contained, in essence, the information of which Mr. Osborne now, for the first time to the best of this Court's knowledge, complains. I have serious doubt whether Debtor's failure to timely advance this argument before Judge Fowler, prior to the date he ruled, can be asserted at this late date. Debtor had clear, longstanding knowledge of the incident about which he now complains and failed to raise it timely in the tribunal which had, at that point, not ruled.

More important, this Court has no jurisdiction to consider the matter. Nothing in 28 U.S.C. § 157 grants this Court appellate power over, or disciplinary power or

---

Reimposing Stay, and Seting (sic) Aside Order Denying Confirmation: "That the Debtor's Constitutional Rights to a Fair Trial Has Been Violated"; and (3)Third Basis for Reimposing Stay, and Seting (sic) Aside Order Denying Confirmation: "That the Corporation Own Partly by the Debtor is Under a Separate Dispossessory Action in State Court".

oversight responsibility of the State Court of Chatham County. Rather, appellate jurisdiction over decisions of the State Court is defined by the Georgia Constitution which provides that "[t]he Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court." GA. CONST. art. VI, § V, ¶ III (1983). Questions involving tenancy, dispossessory proceedings, and right of possession do not involve title to land, and are therefore properly appealed to the Court of Appeals. *See* Jordan v. Atlanta Neighborhood Housing Services, Inc., 251 Ga. 37, 302 S.E.2d 568 (Ga. 1983)(holding that as right of possession of land rather than title was the issue before the state court that appeal belonged with the Court of Appeals); Brumfield v. Home Owners Loan Corporation, 196 Ga. 821, 27 S.E.2d 678 (Ga. 1943)(holding that as case did not involve title to land directly that it belonged before the Court of Appeals); Arnold v. Water Power & Mining Co. of Georgia, 147 Ga. 91, 92 S.E.889 (Ga. 1917)(holding that issues involving tenancy are appealable to the Court of Appeals). Therefore, the Georgia Court of Appeals, the body to which Debtor has filed an appeal of Judge Fowler's order, which Debtor notified this Court of on November 13, 2000, is the proper forum in which this matter should be adjudicated.

Even absent the timeliness and jurisdictional impediments, Debtor's Motion does not demonstrate surprise, or newly-discovered evidence, as contemplated in Rule 9024(b).[4] *See* In re Dennis, 209 B.R. 20 (Bankr. S.D. Ga. 1996)(Davis, J.)(denying Rule 60b

[4] Bankruptcy Rule 9024(b), which incorporates Federal Rule of Civil Procedure 60(b), provides for Relief from Judgment or Order for Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc., for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence *could not have been discovered in time to move for a new trial* under Rule 59(b). (Emphasis added).

motion because evidence was either known to Defendants or could have been known to them prior to trial); Toole v. Baxter Healthcare Corporation, 235 F.3d 1307 (11th Cir. 2000)(establishing a five part test for granting a new trial under 60(b)(2): (1) the evidence must be *newly discovered* since the trial; (2) *due diligence* on the part of the movant to discover the new evidence must be *shown*; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial would probably produce a new result)(emphasis added). Evidence of the alleged misconduct was known to Debtor on July 18. Judge Fowler's final order was dated September 12 - clearly the evidence was not newly discovered after Judge Fowler took final action in his case. Nor was it newly discovered after this Court's November 3, 2000, dismissal of Debtor's Chapter 13 case. Debtor's Motion is denied.

Unless and until there is a reversal of the final judgment of the State Court of Chatham County establishing the indebtedness of Mr. Osborne to the Thomases and determining that the lease had been terminated pre-petition, there simply is no ground on which this Court could or should now reconsider its previous decision denying confirmation and dismissing the Debtor's case. The Debtor continues to be active in litigating this matter *pro se* and is a very effective and articulate spokesman for the cause he champions. However, he misapprehends the propriety of the relief he is seeking from this Court and the scope of this Court's permissible jurisdiction. While the landlord-tenant issues might have been tried in this Court under 28 U.S.C. § 157(b)(2)(B) and (C), the decision to lift the stay and defer to State Court is long-since final. It was tantamount to a decision to abstain under 11 U.S.C. § 1334(c) and that decision vested the authority to rule on the dispute with the

Thomases elsewhere - and for relief at this late date, elsewhere Debtor must now turn.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of March, 2001.